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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1966

No. 1088

CHARLES H. HENRIKSON and
OLIVER HENRIKSON,
Petitioners,

vs.

STEWART L. UDALL, United States Secretary of the Interior; THE UNITED STATES OF AMERICA; and GEORGE STEED, District Ranger, United States Department of Agriculture, Forest Service,
Respondents.

PETITION FOR WRIT OF CERTIORARI

to the United States Court of Appeals for the Ninth Circuit

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

	Page
Reference to reports	2
Grounds on which the jurisdiction of this court is invoked	2
Questions presented for review	4
Statement of the case	6
Basis for federal jurisdiction in the court of first instance	8
Argument	9
The administrative proceedings, taken as a whole, denied petitioners due process and equal protection of the laws	9
The proceedings of the federal courts have not afforded petitioners due process but on the contrary, have merely perpetuated, without a hearing, the original administrative error	10

Table of Authorities Cited

Cases	Pages
Adams v. Witmer, 271 F.2d 29	8
Morgan v. The United States (1936), 298 U.S. 468, 56 S.Ct. 906, 80 L.Ed. 1288, 304 U.S. 1, 58 S.Ct. 773, 82 L.Ed. 1129	9, 11
Word v. U.S.D.C. (Ala. 1963) 223 F.Supp. 614	11

Statutes	
Administrative Procedure Act, 5 U.S.C., Sections 1001, et seq.	2, 6, 8, 10
5 U.S.C. 1008(c)	11
5 U.S.C. 1009	8
30 U.S.C. 23 and 35	6
28 U.S.C.A., Section 1254(1)	3

Constitutions	
Constitution of the United States Annotated:	
Fifth Amendment	6
Seventh Amendment	6

Regulations	
43 C.F.R., 1957 Supp., Part 221	6, 11

Rules	
Rules of the United States Court of Appeals:	
Rule 23(a)	2
Rule 23(i)	2

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The petition of Charles H. Henrikson and Oliver Henrikson respectfully represents:

REFERENCE TO REPORTS

The United States District Court for the Northern District of California rendered a decision, dated May 22, 1964. This decision is reported in 229 Federal Supplement, pages 510 to 512, inclusive. This is the only officially reported opinion and a copy of such opinion is appended hereto, as required by Rule 23(a) and (i). There was also an opinion of the United States Court of Appeals for the Ninth Circuit, dated September 15, 1965, a copy of which is appended. This opinion has not been officially reported.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The jurisdiction of this Court is invoked upon the following grounds: (a) the date of the judgment sought to be reviewed and the time of its entry are as follows: On the 28th day of October, 1965, the opinion of the United States Court of Appeals denying a petition for rehearing was filed in the office of the clerk of said Court. On November 9, 1965, pursuant to said opinion a mandate and certified copy of the judgment of the Court of Appeals for the Ninth Circuit was issued and forwarded by said Court to the United States District Court for the Northern District of California. Certiorari is sought to review this action and, in turn, the purpose of the said application to the United States Court of Appeals for the Ninth Circuit was to review, pursuant to the Administrative Procedure Act, 5 U.S.C. §§1001, et seq., the entire

administrative and judicial proceedings, including the administrative actions of the United States Department of the Interior, culminating in a decision of the Secretary of the Interior, No. A28763, issued June 4, 1963; the subsequent decision of the United States District Court for the Northern District of California, granting summary judgment, rendered May 22, 1964, and reported in 229 F.Supp. at pages 510 to 512, inclusive; the decision of the United States Court of Appeals for the Ninth Circuit, affirming the District Court on September 15, 1965; and finally, the aforesaid decision of the United States Court of Appeals for the Ninth Circuit, denying re-hearing, which is the immediate and final judgment for which review is sought.

(b) The date of the order respecting a re-hearing is set forth above. On January 31, 1966, an order extending time to file petition for writ of certiorari was signed by the Honorable William O. Douglas, Associate Justice of this Court, which order was pursuant to an application therefor filed with this Court on the 27th day of January, 1966. The order extending time to February 26, 1966, was entered "without prejudice to the Court's consideration of whether this application has been filed in time."

(c) The statutory provision believed to confer on this Court jurisdiction to review the judgment or decree in question by writ of certiorari is §1254(1), Title 28, U.S.C.A.

Jurisdiction of this Court is invoked on the basis of said statutory provision, and on the further

grounds that the United States Court of Appeals for the Ninth Circuit has so far sanctioned such a departure by the District Court from the accepted and usual course of judicial procedings as to call for an exercise of this Court's power of supervision, and that said refusal by the Court of Appeals has deprived petitioners of their property, to wit, some 20 acres of real property without due process of law and without the equal protection of the law, and that petitioners have been deprived of the judicial review to which they are entitled under the provisions of the Administrative Procedure Act, and that they have been deprived of a hearing and their right to trial on the merits, and have thereby suffered irreparable injury and irreparable violation of due process.

QUESTIONS PRESENTED FOR REVIEW

The questions presented for review are:

First. Whether petitioners have had their property taken without due process of law and without equal protection of the law.

Second. And subsidiary to the principal question above stated, is whether the defendant, Stewart L. Udall, United States Secretary of the Interior, could, consistent with due process, and without granting a hearing summarily reverse over the signature of a deputy solicitor the findings of fact and conclusions of law of a departmental hearing examiner in the first instance, and in the second instance, the appellate

decision of his own director of the Bureau of Land Management, when these findings and decisions were based upon substantial evidence and to a critical extent upon matters not shown by the written record of the proceedings, i.e., whether the Department of Interior, once having established a fact-finding and appellate procedure by rule, and requiring petitioners to follow the procedures of the Department, may then at the final appellate level within the administrative proceeding summarily and arbitrarily reverse its own fact-finding and appellate processes without petitioners having had the opportunity to be heard, argue or object, or whether, on the contrary, the Department of the Interior, once having established administrative hearing and review, must follow as a matter of due process traditional appellate practices. In short, whether procedural administrative due process permits the Department of the Interior to set up an elaborate and costly system of trial and appellate practice which, in effect, operates as a sort of lottery in which the petitioners can win their case at the trial and appellate level, and then lose it at the final level of administrative review without any opportunity to be heard and, particularly, where the hearing officer's findings were based on matters outside the written record, and the final reviewing authority which decided the administrative action did not hear the evidence or see the witnesses. To put it another way, can the outcome of administrative action be allowed, consistent with due process, to be dependent upon the opinion of the last man who sequentially happens to examine the file?

Third. As a second subsidiary issue, have petitioners been accorded due process and the judicial review contemplated by the Administrative Procedure Act, 5 U.S.C. §§1001, et seq., where the federal courts grant and affirm summary judgment without giving petitioners the opportunity to enquire into the fairness or basis of the administrative action?

Fourth. The constitutional provisions and statutory provisions, which the case involves, are as follows: The Fifth Amendment, Constitution of the United States Annotated; Seventh Amendment, Constitution of the United States Annotated; 5 U.S.C. §§1001, et seq.; Title 43 C.F.R., Part 221; 30 U.S.C. 23 and 35 (relating to mining discovery of minerals in marketable quantity).

STATEMENT OF THE CASE

In March, 1953, appellants located, and ever since have been in possession of a certain placer mining claim called "Squaw Creek Placer", comprising some 20 acres near Lake Tahoe, California. On or about 29 August, 1957, petitioners filed application for a patent to the "Squaw Creek Placer" and for the adjacent "Squaw Valley Placer", which latter claim is not here in issue, a patent thereto having been granted.

The Forest Service, United States Department of Agriculture, initiated a contest of these patent applications in January, 1959. A hearing on this contest was duly held before John A. Wood, a duly appointed

hearing examiner of the United States Department of the Interior, Bureau of Land Management.

On October 30, 1959, the said examiner rendered his decision and findings of fact and conclusions of law, declaring both claims valid and entitled to patent. The Government appealed. The Director, Bureau of Land Management, affirmed. Both the hearing examiner and the Director found a valid discovery of mineral in marketable quantity to exist on "Squaw Creek". To some extent this finding was based on matters outside the record, the hearing officer having stated in his opinion, "This examiner has never presided at a hearing where the products manufactured from the materials from the claims in question, as testified to by the witnesses, were visible to a certain extent from the hearing room. Specifically, the concrete lift house built with materials from the claims in question, the floors of the Squaw Valley lodge building, the swimming pools, the concrete floors for the new lodge, all built from materials purchased from the Henrickson Brothers prior to 1959." (Decision of the hearing examiner.)

The Government once again appealed this time to the Secretary of the Interior, who purported to reverse the two decisions of his own department over the signature of a deputy solicitor, and this without a hearing, although one was specifically requested, and in the face of the opinion of the Director of Land Management that "the evidence of record fully supports the examiner's findings that the Squaw Valley gravel placer and the Squaw Creek mining claims

were validated by discovery prior to July 23, 1955, and that there are presently existing within the limits of each claim sand and gravel deposits of commercial quality and quantity and that these deposits were and now are susceptible of extraction, removal and marketing at a profit".

Petitioners then filed in the United States District Court a complaint for judicial review of the administrative procedure and decisions. A motion for summary judgment was granted in favor of the Government and the other defendants without the taking of any evidence and without permitting petitioners to enquire into the basis or nature of the administrative appellate review.

BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

The jurisdiction of the United States District Court for the Northern District of California was invoked under the provisions of the Administrative Procedure Act, 5 U.S.C. 1001, et seq., and particularly the provisions thereof providing for a judicial review of the acts of federal administrative agencies in §1009 thereof. That this is a proper basis for jurisdiction was decided by the case of *Adams v. Witmer,* 271 F.2d 29.

ARGUMENT

THE ADMINISTRATIVE PROCEEDINGS, TAKEN AS A WHOLE, DENIED PETITIONERS DUE PROCESS AND EQUAL PROTECTION OF THE LAWS.

In *Morgan v. The United States* (1936), 298 U.S. 468, 56 S.Ct. 906, 80 L.Ed. 1288, 304 U.S. 1, 58 S.Ct. 773, 82 L.Ed 1129, this Court decided that the person who makes the determination "must consider and appraise the evidence", and that a fair hearing is denied where subordinates hold a hearing and the decision is thereafter made by an officer who does not attend the hearing, but relies upon the recommendation of subordinates. In this case, the petitioners commenced their struggle with the Department of the Interior in 1957. The case was not finally decided within the Department until June of 1963. Petitioners have at all times been in possession of the involved land since 1953. Petitioners are dependent for their livelihood upon the possession and ownership of this land. Their possession and ownership was confirmed after a full and complete hearing in 1959. After the Government appealed from this decision petitioners again prevailed and the Department of the Interior affirmed its own actions in December of 1960. Both the hearing officer and the director of the Bureau of Land Management found that there was ample evidence to support petitioners' claim. Thereafter, and after being required to engage in some four years of expensive litigation, the Office of the Secretary of the Interior, over the signature of a deputy solicitor, summarily reversed the findings at all lower levels of the Department after denying to petitioners any opportunity to

be heard, and on the face of the decision in derogation of the well settled principle that a reviewing body must affirm, if the decisions below are based upon substantial evidence. It is respectfully submitted that the Department of the Interior, consistent with the Fifth Amendment, cannot set up a system of administrative review requiring petitioners to submit to repeated and costly Government appeals, and then have the ultimate decision dependent, for all that appears, upon the arbitrary and capricious whim of an officer who has not heard the evidence and who has summarily refused to afford to the petitioners an opportunity to appear and be heard at what purports to be the decisive level of the administrative process. It is respectfully submitted that what has happened here within the administrative process, if allowed, makes a hollow mockery of the settled principles of due process.

THE PROCEEDINGS OF THE FEDERAL COURTS HAVE NOT AFFORDED PETITIONERS DUE PROCESS BUT ON THE CONTRARY, HAVE MERELY PERPETUATED, WITHOUT A HEARING, THE ORIGINAL ADMINISTRATIVE ERROR.

The legal safeguard against arbitrary administrative action is the Administrative Procedure Act, 5 U.S.C. 1001, et seq. Petitioners contend that it is the purpose of this Act to review the entire proceedings before a Federal administrative agency, and it is this Act which the Congress intended to be a safeguard to persons in the petitioners' position against arbitrary and capricious administrative action. Peti-

tioners contend that in such a judicial proceeding they are entitled to a review of the administrative proceedings as a whole, and that "any preliminary procedural or intermediate agency action or ruling not directly reviewable shall be subject to review on the review of the final agency action." See, 5 U.S.C. 1008(c); *Word v. U.S.D.C.* (Ala. 1963) 223 F.Supp. 614. It is thus the *entire* proceeding which the Court must review and not merely the final decision in the administrative process. In this case, the District Court granted summary judgment and this grant of summary judgment was affirmed and upheld at appellate levels. Despite petitioners' request to the Federal courts that they be allowed to present evidence, this request was summarily denied. This is not, it is submitted, the type of judicial review which is contemplated and petitioners contend that they were entitled to subpoena witnesses and present evidence bringing them within the rule of the *Morgan* case, *supra.* They were entitled to introduce into evidence and have considered by the Federal court the provisions of Title 43 C.F.R., 1957 Supp. Part 221, relating to appellate procedures within the Department of the Interior. An issue of fact was presented as to whether or not these procedures were complied with, and, if not, whether the failure to comply with them was arbitrary and a denial of due process. What has happened here is that the last time that any testimony was taken in this case was before the hearing officer in the year 1959. Petitioners have had no opportunity of judicial review of the question of whether the action of the Secretary of the Interior

was, in fact, arbitrary and have been denied the opportunity to present any evidence whatsoever on that question.

The question which petitioners here seek to have answered is fundamental and of far reaching importance and worthy of the consideration of this Court. Essentially, the question involved is whether the Department of the Interior, or any other administrative agency of the Federal Government, may, consistent with due process, set up elaborate and costly systems of trial and appellate review which, while outwardly seeming to preserve a semblance of due process, are, in fact, ultimately dependent upon the whim and caprice of the last underling to whom administrative authority is delegated, and are petitioners to be required to abide by such ruling without the opportunity to enquire and even though such ruling is inconsistent with the rulings and findings of all prior persons to whom administrative authority was delegated, and even though the ultimate delegee is an unknown face who did not hear the evidence or see the witnesses. Subsidiary to this is the question of whether the judicial review contemplated by the Administrative Procedure Act is limited, as the courts below believe, to a consideration of whether the ultimate administrative delegee might have had some rational basis for acting as he did, and whether the Federal courts are limited to presuming that this is so, or whether the Administrative Procedure Act is to be so construed that it requires a genuine judicial control over Federal administrative agencies. It is respectfully sub-

mitted that a judicial review which is limited to an enquiry as to whether there is any conceivable shred of evidence to support the final decision in the administrative process, disregarding any and all intermediate decisions and proceedings, is in practical effect no judicial review at all, particularly when buttressed by the presumption that an official duty has been regularly performed, and denying to petitioners the opportunity to be heard on the question of whether or not this is so. Such a system must necessarily permit justice to be dispensed in a quasi judicial proceeding through the whim and caprice of minor functionaries, and declares that the Federal Judiciary is powerless to guarantee due process of law to its citizens. The question is important and invokes the supervisory power of this Court.

Dated, February 25, 1966.

Respectfully submitted,

NOBLE MCCARTNEY,

Attorney for Petitioners.

(Appendices Follow)

Appendix A

United States District Court
N. D. California, S. D.
May 22, 1964

Civ. No. 41,749

Charles H. Henrikson and Oliver M. Henrikson,
Plaintiffs,

vs.

Stewart L. Udall, United States Secretary of the Interior, the United States of America, George Steed, District Ranger, United States Department of Agriculture, Forest Service, et al.,
Defendants.

Opinion

Harris, Chief Judge.

Defendants have moved for summary judgment in an action initiated by plaintiffs under the Federal Administrative Procedure Act, 5 U.S.C.A. § 1001 et seq., asking for review of a decision by the Secretary of the Interior who ruled against plaintiffs' mining claim on Squaw Creek Placer. The motion is based on the pleadings and the exhibits lodged and filed with the court and constituting the entire record of proceedings heretofore had by plaintiffs in their hearing,

and the review therefrom, before the Department of the Interior. Defendants contend that the undisputed facts entitled them to a summary judgment inasmuch as the evidence upon which the Secretary based his decision (Exhibit C) was sufficient as a matter of law to sustain his holding. (Foster v. Seaton, 106 U.S.App. D.C. 253, 271 F.2d 836, 838; Adams v. United States, (9th Cir.) 318 F.2d 861, 873.)

The record, which has been reviewed in its entirety by the court, discloses that plaintiffs were the holders of two placer-mining claims known as Squaw Valley Placer and Squaw Creek Placer. The former was obtained in 1949 and the latter in 1953 and both dealt with sand and gravel. Plaintiffs applied for a patent in 1957 under the general mining laws and administrative regulations (30 U.S.C.A. § 21 et seq.).

The two claims adjoined one another at the mouth of Squaw Valley in the Tahoe National Forest about five miles north of the lake. Squaw Valley Placer had been worked for its sand and gravel for some years prior to the initiation of the patent proceedings; Squaw Creek Placer had been explored as a possible source of materials when the sand and gravel of Squaw Valley Placer should become exhausted. The record indicates an expenditure of several hundred dollars on the Squaw Creek claim.

The government challenged both claims in a contest proceeding brought against plaintiffs' holdings, alleging that there had been no discovery of a valuable mineral as required by the patent laws. At the conclusion of a hearing in 1959 before a Hearing Examiner,

the case went to the Secretary of the Interior whose decision is now being challenged by plaintiffs insofar as it declared invalid the Squaw Creek claim. Plaintiffs ask this court to upset the decision of the Secretary of the Interior (70 Interior Department Decisions 212), on the ground that it is not supported by substantial evidence.

The record discloses that three expert witnesses, all of whom examined Squaw Creek Placer, independently stated that the gravel did not exist in commercial quantities nor quality and would not justify development by a prudent man.[1] These witnesses, in addition to their outstanding qualifications, walked over the terrain, measured the showings of sand and gravel in the pits by pacing and by tape, made maps to determine the geological character of the deposits both as to their extent and their nature and to estimate their quality and quantity. They looked at the excavations which had been made on the claims, identified the material and analyzed it in terms of its characteristics for commercial development. Thus the defendants produced an abundance of evidence to support the opinions expressed by the several witnesses as to the gravel deposits to be found at Squaw Creek Placer.

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[1]See testimony of William C. Sanborn, pp. 98 and 101, Tr.; Alfred J. Oyster, p. 285; Ira E. Klein, pp. 471 (1.19): "Well, on the basis of what is actually showing, as to what I consider classified material which would be reasonable to process, I do not believe that a prudent man would be justified (in investing time and money * * * in the hope of producing at this time a paying mine or quarry.)" 483.

[1] The legal requirement for obtaining a patent on a mining claim must be fulfilled by claimant making a discovery whose existence is in such condition that the government may confirm it by an examination. (United States v. Houston, 66 I.D. 161.) The several representatives of the government failed to confirm gravel deposits in such quantity or quality as to warrant a prudent man in making an investment in Squaw Creek Placer.

[2, 3] Where there is substantial evidence to support the findings and conclusions of the Secretary of the Interior, the court will not attempt to resolve any conflicts in the testimony nor to place its own interpretation on the evidence. Its function is to review the record to ascertain whether there is evidence which warrants the decision of the Secretary (Foster v. Seaton, supra; Adams v. United States, supra.) Summary judgment is the proper procedure for disposing of the case when based upon both the pleadings and the "exhibits lodged and filed" and consisting of the entire administrative record (Adams v. United States, supra, 318 F.2d at 865.)

[4, 5] Since the Hearing Examiner based his findings upon a mistake of law in assuming that the discovery on the adjoining claim of Squaw Valley Placer could inure to the benefit of Squaw Creek Placer it was proper for the Secretary to correct this error in his review of the case. But for the Examiner's mistake in the law he must have found consistent with the evidence that discovery was not made on the Squaw Creek Claim prior to July 23, 1955, the date after

which common varieties of sand and gravel could not provide the mineral basis for a valid claim. 30 U.S.C.A. §§ 601, 611. It is the Secretary's decision which is controlling and which the court must consider in weighing the evidence submitted upon the patent hearing. As held in such cases as Sisto v. Civil Aeronautics Board, 86 U.S.App.D.C. 31, 179 F.2d 47, 51, and N.L.R.B. v. Stocker Mfg. Co., 3 Cir., 185 F.2d 451, 453, the findings of the examiner are tentative and interlocutory; it is the order of the reviewing body which is final and appealable.

[6, 7] The court looks to the expertise of the Department of the Interior, which has plenary authority over the administration of public lands, including mineral lands. (Cf. Best v. Humboldt Mining Co., 371 U.S. 334, 336, 83 S.Ct. 379, 9 L.Ed.2d 350.) It is appropriate that an administration agency make its determination of the issues involved in this patent claim based upon gravel allegedly discovered in Squaw Creek Placer. This the Secretary of the Interior has now done and his decision is supported by an abundance of evidence.

Accordingly, it is ordered that defendants' motion for summary judgment be, and the same hereby is, granted.

Appendix B

United States Court of Appeals
for the Ninth Circuit

Charles H. Henrikson and Oliver Henrikson, Appellants, vs. Stewart L. Udall, United States Secretary of the Interior, The United States of America, and George Steed, District Ranger, United States Department of Agriculture Forest Service, Appellees.	No. 19,560

[September 15, 1965]

Appeal from the United States District Court for the
Northern District of California
Southern Division

Before: CHAMBERS, BASTIAN and KOELSCH,
Circuit Judges.

PER CURIAM.

This is an appeal from a grant of summary judgment by the United States District Court, Northern District of California, the effect of which was to uphold appellees' decision denying appellants' application for a land patent in the Tahoe National Forest.

It is the function of neither this Court nor of the District Court, in a proceeding such as this, to weigh the evidence adduced in the administrative proceeding. Rather, if upon review of the entire record of that proceeding there is found substantial evidence to support the Secretary's decision, that decision must be affirmed. *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474 (1951); *Foster v. Seaton*, 271 F.2d 836 (D.C.C.A. 1959).

We are satisfied, as was the District Court, that the decision of the Secretary is supported by substantial evidence. The opinion of Chief Judge Harris [229 F. Sup. 510 (1964)] reviews the evidence in some detail; and we find no fault with the grant of summary judgment.

Accordingly, the judgment of the District Court is

Affirmed.

Appendix C

Office of the Clerk
U. S. Court of Appeals
P.O. Box 547
San Francisco 1, Calif.

Messrs. Nagle & Vale
Attorneys at Law
2070 Pioneer Court
San Mateo, Calif.

Dear Sir:

The Petition for a Rehearing heretofore filed in case No. 19560—Henrikson v. Stewart Udall was this day denied.

Pursuant to Rule 26, and unless stayed by the order of the Court, a certified copy of the judgment of this Court under said Rule will be due to issue on the expiration of five (5) days from the date hereof.

Time for certiorari petition: Civil cases, 90 days; Criminal cases, 30 days.

Sincerely,
Frank H. Schmid,
Clerk.

Appendix D

United States Court of Appeals
For the Ninth Circuit

Charles H. Henrikson and Oliver Henrikson, Appellants, vs. Stewart L. Udall, U.S. Secretary of the Interior, etc. et al., Appellees.	No. 19,560

JUDGMENT

Appeal rrom the United States District Court for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered September 15, 1965.

Appendix E

CONSTITUTIONAL LAW APPLICABLE

Amendment V—Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process; Just Compensation for Property.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.